

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000378-001 DT

10/29/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

STATE OF ARIZONA

KENNETH M FLINT

v.

GARED KIRK DYKMAN (001)

CRAIG W PENROD

REMAND DESK-LCA-CCC
SCOTTSDALE CITY COURT

RECORD APPEAL RULE / REMAND

SCOTTSDALE CITY COURT

Cit. No. #1564718

Charge: 1) DUI-LIQUOR/DRUGS/VAPORS/COMBO
 2) DUI W/BAC OF .08 OR MORE
 3) EXTREME DUI-BAC .15 OR MORE
 4) 19-19
 5) NO CURRENT REGISTRATION

DOB: 06/27/78

DOC: 09/07/02

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement and I have considered and reviewed the record of the proceedings from the trial court, exhibits made of record and the memoranda submitted.

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Facts

On September 7, 2002, Appellant, Gared Dykman, was arrested for investigation of Driving While Under the Influence at about 2:25 a.m. Scottsdale Police Officer Orvis took Appellant to the hospital, and Appellant's blood was drawn at 3:05 a.m. Following the blood draw, Appellant was asked numerous questions by the Scottsdale Police Officers and they made a decision to release him at 4:05 a.m. Appellant was "processed", which included fingerprinting and photographing, and then placed in a holding cell until his release to a taxi cab at 8:05 a.m.

Appellant's trial counsel filed a Motion to Dismiss, claiming a violation of Appellant's due process rights to gather independent and exculpatory evidence. The trial judge concluded that no violation of Appellant's rights occurred, and denied Appellant's Motion to Dismiss.

Appellant has filed a timely Notice of Appeal in this case, and the only issue presented is whether the trial judge (the Honorable James Blake, Scottsdale City Court Judge) erred in denying Appellant's Motion to Dismiss.

Issue & Analysis

The only issue Appellant raises is whether the trial court abused its discretion when it held that there had been no denial of his due process rights, when Appellant had made no custodial request for assistance in collecting exculpatory evidence. A defendant arrested for DUI has a right to gather exculpatory evidence, specifically an independent blood test. A.R.S. § 28-1388(C) states in part:

The person tested shall be given a reasonable opportunity to arrange for any physician, registered nurse or other qualified person of the person's own choosing to administer a test or tests in addition to any administered at the direction of a law enforcement officer.

However, law enforcement officers are not required to advise a suspect of his right to obtain an independent blood draw.¹ Further, the Arizona Supreme Court held:

[I]f a defendant *affirmatively requests* a separate blood sample for independent testing, law enforcement officials may not interfere with his efforts to obtain such a sample.² [emphasis added]

¹ *State v. Olcan*, 204 Ariz. 181, 61 P.3d 475 (App. 2003).

² *State v. Kemp*, 168 Ariz. 334, 337 n.4, 813 P.2d 315, 318 n.4 (1991)[citing *Amos v. Bowen*, 143 Ariz. 324, 327-28, 693 P.2d 979, 982-83 (App.1984)].

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As noted by the trial judge, Appellant never made *any* request to gather exculpatory evidence or to be released. Appellant's due process rights were not violated, for in Arizona, even an eleven-hour detention after one is released did not violate due process.³ Most significantly, the Arizona Court of Appeals has held that only wrongful denials of release constitute an interference with one's right to collect exculpatory evidence:

A defendant has reasonable means to obtain a blood sample short of release on bail. For example, a defendant or his attorney may call and arrange for a physician, nurse, or technician to come to the jail and obtain the defendant's blood sample. *See* A.R.S. § 28-1388(C) (defendant may arrange for a qualified person to administer tests); *State v. Klein*, 147 Ariz. 77, 80, 708 P.2d 758, 761 (App.1985) (doctor would have been allowed into jail to obtain the defendant's blood sample); *see also Bolan*, 187 Ariz. at 161, 927 P.2d at 821 (practical difficulties of securing transportation or obtaining medical personnel do not violate due process).

The courts have found due process violations when the State unreasonably interfered with a defendant's right to gather exculpatory evidence. *See McNutt v. Super. Court*, 133 Ariz. 7, 648 P.2d 122 (1982) (jail officials refused to honor request to telephone attorney); *Amos v. Bowen*, 143 Ariz. 324, 693 P.2d 979 (App.1984) (officer voluntarily undertook transport to hospital but then delayed trip by two hours); *Smith v. Ganske*, 114 Ariz. 515, 562 P.2d 395 (App.1977) (jail officials told defendant's friend prepared to make bail that defendant was not at the jail). All of these cases involved affirmative state interference with the defendant's right, however. No such interference occurred here.

In the DUI cases involving a defendant's release, the denial of release constituted unreasonable interference because the denial violated the law. In *State v. Klein*, the police refused to apply the bail schedule to a felony DUI at a time when the statute did not exclude felony DUI's from the bail schedule. In *Smith v. Cada*, police refused defendant's requests to telephone his lawyer and denied immediate release even though the bail schedule authorized it. 114 Ariz. 510, 562 P.2d 390 (App.1977). These cases hold only that the *wrongful* denial of release is presumptive evidence of "unreasonable interference."⁴

³ *State v. Ramos*, 11 Ariz.App. 196, 463 P.2d 91 (1969).

⁴ *Van Herreweghe v. Burke ex rel. County of La Paz*, 201 Ariz. 387, 389-90, 36 P.3d 65, 67-68 (App. 2001).

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Appellant's 4-hour detention was not wrongful, and thus, was not an unreasonable interference with his right to gather exculpatory evidence. "The Arizona courts have never held that a defendant's right to gather exculpatory evidence mandates his immediate release."⁵ Thus, I conclude that the trial judge did not err in denying the Appellant's Motion to Dismiss.

IT IS THEREFORE ORDERED affirming the judgments of guilt and sentences imposed by the Scottsdale City Court in this case.

IT IS FURTHER ORDERED remanding this matter back to the Scottsdale City Court for all further, if any, and future proceedings in this case.

/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT

⁵ *Id.*, at 389, 36 P.3d at 67.